

Federal Highway Administration Webinar on Value Capture Techniques: Development Agreements and Other Contracts

Webinar Date: March 24, 2021

Answers to Questions Posed During the Webinar

Is there a template for Development Agreements (DAs) at the county level to share with the audience?

Kim: The development agreements primer contains a standard template that is often used across the country. There are also examples in the presentation and primer that provide more context.

What are the authorizing statutes like for these activities?

Kim: The authority to create these agreements is usually already built into standard enabling legislation. Some States like Massachusetts have enabling legislation for specific value capture techniques as well. In general, each of the value capture techniques have enabling statutes in most States. DAs are also often codified into local ordinances. Contract law can also apply if there is no State enabling legislation for DAs.

What are some pitfalls of pre-negotiation? And at what point does the serious negotiation begin?

Mullen: There are three potential pitfalls:

1. Negotiating before all the facts are on the table (i.e., making promises to a developer without knowing the obligations of the agency)
2. Determining an outcome prior to required permitting
3. Undercutting the negotiating team

Once all of these concerns have been mitigated, then negotiation can begin in earnest – often with legal counsel involved.

How do you factor in the impact of developments on the environmental justice (EJ) population in the development agreements?

Tanemori: In Santa Monica, our awareness is growing of environmental justice concerns. These concerns are typically examined as part of the environmental review process. We are also broadening our perspective on community benefits beyond parks and similar tangible amenities.

Mullen: We do not do well enough including environmental justice concerns when assembling DAs. DAs are often treated as stand-alone projects rather than part of a larger whole. Outreach to the EJ community really needs to be in the value-based exchange when scoping projects. Accomplishing some of the environmental justice objectives is in and of itself a value and reinforces the fact that we need to keep an eye on how to measure value.

Are there examples of DAs made between a developer and a State DOT for contributing private funds towards a future DOT-delivered transportation project?

Mullen: Massachusetts has an expendable trust statute that permits the Commonwealth to make use of private funds. There are few examples of those because developers are not interested in relieving themselves of their money without a firm commitment from a public agency. State DOTs are not in the business of making firm commitments on development so arrangements like these are exceedingly rare.

Has the City of Santa Monica ever been legally challenged or faced community resistance when negotiating building heights?

Tanemori: Yes, the litigation on approved DAs usually begins with the environmental analysis. Building heights receive particularly strong reactions from the community in Santa Monica, but municipal staff always ensure we are staying in compliance with maximums in the general city plan.

How receptive is the City of Santa Monica to increasing the bulk and mass of buildings?

Tanemori: Although the priorities and willingness of decision-makers can change over time, Santa Monica's City Council and the planning department take things on a case-by-case basis – we try to examine whether a development proposal is a fair trade-off or a more problematic idea.

Does the City of Santa Monica include post-development conditions regarding property maintenance and how does the city manage change of ownership?

Tanemori: Yes, DAs include post-development aspects including property maintenance. The DAs also include change of ownership processes; change of ownership happens all the time.

If the elected body does not support a requested increase in the building envelope, what other incentives in your experience would be most appealing to a developer?

Tanemori: For larger scale or longer-term phased development, providing consistency of codes and regulations is valuable to the developer. For project-based or shorter-term development, keeping the lines of communication open with the developer to see what terms they are happy with is essential.

At the city and county levels, should the expertise of DAs be in the economic development department or in the planning department?

Tanemori: In Santa Monica, the city planning department leads the work on DAs, although the economic development department can have a greater role when public land is involved. The economic development department takes the lead on DDAs as well.

Kim: It depends on the city; in Washington DC, the economic development department is the lead.